

Wisconsin's Green Tier System for Exemplary Environmental Performance

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These materials outline a two tier regulatory system that would promote and reward exemplary environmental performance. This proposal is offered in the spirit of Wisconsin's interest in constantly moving forward through public dialogue.

The **Green Tier** regulatory category would complement the existing regulatory tier, which would remain. The **Green Tier** allows business and other regulated and unregulated organizations to achieve environmental performance not possible or feasible in the lower tier. The vision and means of achieving it are straightforward:

The **Green Tier** allows businesses and others to deliver greater environmental and economic performance through a cost-saving, voluntary regulatory system using contract law.

No regulated organization is forced to leave the command and control system which remains for those who want or need it. **Green Tier** performance contracts encourage organizations to do *more than the minimum* to benefit them, the environment and society and to reap the rewards of that benevolent performance.

Problem statements

The Environmental Problem: Laws have controlled the easiest pollution but are poorly suited for more diffused pollution plus urgent new challenges like climate change and eco-efficiency. Inflexible, unrelated laws focusing on air, water or waste may work at cross purposes, discourage innovation and waste resources needed for serious unregulated problems. **Green Tier's** performance contracts may adapt to local, state or global needs and to the needs of business, government and the community.

The Business Problem: Most businesses obey environmental laws and pay pollution control costs. They also know laws can discourage innovation and require costly procedures that do not greatly enhance environmental performance. Economic change has made business more vulnerable to inefficiency, including regulatory inefficiency. **Green Tier** performance contracts can attack regulatory redundancy, reduce inefficiency and reconcile disconnects among laws while maintaining legal standards.

The Government Problem: Studies indicate the regulatory system is not moving significantly forward at this time and regulatory reinvention has had limited success. Some regulators and activists fear that change will lead to backsliding. That need not be true. To the contrary, **Green Tier** frees time of regulators to focus on sub-performers and give policy attention to larger environmental issues that have been unattended for too long.

Key elements of Green Tier

1. Performance contracts; who's involved: At a minimum, the contract involves the regulated organization and government. More than one government unit may participate in the contract for efficiency and

effectiveness. Contracts also may involve stakeholders to leverage public relations value or provide legal protection and can be enforceable. They also may cover voluntary parties that are not subject to any regulatory authority but want to commit to voluntary performance for purposes such as a pollution offset or for local "quality of life" results such as control of dust, noise, lighting or signs.

2. Performance contracts; *how applied*: The contracts are adaptive and could vary in scope and apply to facilities, firms, supply chains, business sectors, products, regions, neighborhoods, ecological communities, human communities, statutes, substances (pollutants) and larger goals such as climate change, land use, multiple-use forest management or brownfield redevelopment. They may implement an "expanded bubble" concept with performance specifications relating to time (weeks, months, years), public reporting, collaboration processes or non-environmental performance such as jobs. The bubbles also could give attention to unregulated environmental aspects such as wasteful energy consumption or legal but unacceptable levels of hazardous waste.

3. Performance contracts; *contents*: Environmental standards in the law remain. Non-value added requirements in rules, policies and guidance are on the table and may be waived or amended in the contract. This is similar to Wisconsin's Cooperative Environmental Agreement law as approved and implemented through the EPA-Wisconsin innovation agreement, the enforcement provisions of which were approved by the Wisconsin Attorney General. Contracts may meet ecological, business or community needs of parties to the contract.

4. Environmental management systems: The contract must commit to a credible environmental management system (EMS). This also is no different than the existing Wisconsin Cooperative Environmental Agreement Law. This helps insure predictable, documentable and transparent performance and is the foundation of continuous improvement that benefits the firm and society. Designed and validated properly, the EMS may have due diligence legal value, giving the firm added protection against third party lawsuits. A credible system also may deliver value to the company if it meets supplier requirements, has world standing such as is possible through ISO 14000 or complements other systems such as ISO 9000 or HACCP.

5. Government Infrastructure: Existing regulatory agency cultures, structures and processes may need to adapt to accommodate the **Green Tier** concept. That is because there is the temptation to focus on the *authority* needed to insure legal compliance rather than the *responsibility* and *opportunity* to promote environmental stewardship through other mechanisms. Too much focus on the regulatory tool could inhibit the building of trust among parties, an element needed for a successful **Green Tier** program or contract. It also may restrict thinking in ways that produce resistance to a new, performance-driven system.

At the same time, **Green Tier** performance vis-a-vis the commons needs to be credibly verified, which is a government function. That function may be delegated, as is the case with some professional licensing. But such delegation should be undertaken with care for the responsibility ultimately is the government's.

The **Green Tier** proposal sees a government function less aligned with the regulatory culture. It has legal and other program duties and conceives of, advocates, negotiates and validates binding contracts. This is a model similar, but not identical to, the Public Service Commission that makes utility decisions. De-regulation of communications has heightened the importance of this PSC function. The function provides leadership and assistance to **Green Tier** participants and oversees the collection of performance information that has research

value for those searching for more systematic, effective and efficient ways to protect the environment. The new function also is creative and innovative, unlike the command and control bureaucracy.

6. Non-Government Infrastructure: Non-government parties may be authorized and perhaps professionally licensed to perform quasi-government functions. A mixed liability regime puts greater burden on the business or third parties to have a quality system with checks and balances. Contracts may assign government responsibilities to the firm or deputized agent such as in Massachusetts. Validating and monitoring the system and its performance may go to a "deputized" parties. In some cases, this will save money as well as add legal protection. Ultimately, this may be a professional licensing issue for government. This will increasingly probable if there is a lack of credibility, competency or attentiveness in voluntary standards bodies, especially with regard to issues of concern to the public such as compliance with the law and communication of performance to the public. The role of trade and business associations may be explored in the United States as it has been explored and implemented in some parts of Europe, such as Germany, under the EMAS (Ecological Management Audit Scheme) approach to voluntary performance and non-government certification of that performance.

7. Public interest infrastructure: Some firms may wish to involve outside stakeholders in the community to achieve, in part, greater credibility on the outside. Over time, the government, foundations and others could help build a public interest capacity to participate in contract processes like in The Netherlands. In time, it is possible that trust will be rebuilt among the government, business and public interest sectors. It is clear that the building of a constructive working relationship between entities participating in **Green Tier** and the public interest community should be a high priority. But it also is clear that public interest parties, like government parties, that only wish to relate in a combative and litigious way to **Green Tier** entities, risk having have less standing.

8. Performance incentives: Incentives will be available to encourage greater performance. They could be applied to a firm's individual performance or to encourage it to help others with technical assistance, mentoring, etc. Oregon's Department of Environmental Quality researched incentives for its Three Tier System and is considering their liberal application. Government incentives may be applied in a graduated manner to encourage exponentially improving performance and tied to achieving goals. There are no incentives for simply having an EMS in place or having an EMS, such as ISO 14001, that does not meet certain public interest needs articulated for the **Green Tier**. Wisconsin's Department of Commerce may continue to provide start-up assistance to firms that want to adopt an ISO EMS. Assistance is not necessarily connected to the **Green Tier** concept.

9. Permission to contract: Most firms that use the contracts are expected to be better performers. But the door should be open to sub-performers, especially if there is a compelling public interest. That interest might be keeping jobs in a lagging area or giving priority attention to a local environmental problem. It also could be simply helping a lagging, but not criminally negligent firm move from a chronic non-compliance existence to a higher level of regulatory and economic performance by more systematic business practices. Conversely, the state has the right to bar participation in the contracts or direct that a **Green Tier** participant is no longer worthy of that privilege and, in addition to sanctions, direct a firm back to Tier One. Generally speaking, it is expected that **Green Tier** contract firms will have good compliance records. In either case, the contracts would adapt to the situation, including appropriate performance and accountability standards. These standards would be especially well crafted for compliance-driven contracts and EMSs designed to bring a sub-performer to the compliance line and beyond, into the **Green Tier**. Such contracts may, by law, be required to have a court sanction if they are applied in non-compliance, enforcement or chronic sub-performance situations.

10. Legal protection: As a consequence of our litigious society, legal protection is available for **Green Tier** participants, although each participant would be legally accountable under the performance contract. The protection could come in three ways that would be linked to the legal system, which could apply its energy, authority and creativity in three areas:

1. Court sanctioned "environmental performance decrees";
2. Credible environmental management systems that connote "due diligence";
3. Performance contract provisions that use more flexible mixed liability rather than strict liability regimes.

Thought has been given to the design and operation of the above in numerous legal and public administration quarters both from a perspective of providing protection to the business and also accountability to the public through an enforceable contract.

11. What happens over time: Just as the insurance industry distinguishes among performers and risks, the **Green Tier** system will allow leaders to emerge that will benefit economically and be emulated through best practice sharing and other means, some encouraged by business and some by government. Validated performance achieved by firms involved in **Green Tier** could produce the information needed by the financial sector in making decisions about reducing insurance rates, providing cheaper money or evaluation of share price as a function of profitability over time. **Green Tier** fosters competition and as others see **Green Tier** participants to be better off, they will seek to move to the higher level, the **Green Tier** as well. **Green Tier** also fosters a community interested in best practices and performance -- performance in all aspects of the ecosystem -- in economy, environment and community. In seeking that optimal condition, collaboration will be necessary to produce trust among participants.

Note: This proposal does not necessarily represent the policies of the Department of Natural Resources or the State at this time and is provided for public information and discussion.

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